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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/614,268	07/07/2003	David H. McFadden	54330/322596	7748
23370	7590	02/04/2008		
JOHN S. PRATT, ESQ KILPATRICK STOCKTON, LLP 1100 PEACHTREE STREET ATLANTA, GA 30309			EXAMINER COCKS, JOSIAH C	
			ART UNIT 3749	PAPER NUMBER
			MAIL DATE 02/04/2008	DELIVERY MODE PAPER

Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

Office Action Summary

Application No.

10/614,268

Applicant(s)

MCFADDEN, DAVID H.

Examiner

Josiah Cocks

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-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on 30 November 2007.
- 2a) ☒ This action is FINAL. 2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 1-7 is/are pending in the application.
- 4a) Of the above claim(s) _____ is/are withdrawn from consideration.
- 5) ☐ Claim(s) _____ is/are allowed.
- 6) ☒ Claim(s) 1-7 is/are rejected.
- 7) ☐ Claim(s) _____ is/are objected to.
- 8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on _____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
- Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
- Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some * c) ☐ None of:
- ☐ Certified copies of the priority documents have been received.
 - ☐ Certified copies of the priority documents have been received in Application No. _____.
 - ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- | | |
|--|---|
| 1) <input type="checkbox"/> Notice of References Cited (PTO-892) | 4) <input type="checkbox"/> Interview Summary (PTO-413)
Paper No(s)/Mail Date. _____ |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948) | 5) <input type="checkbox"/> Notice of Informal Patent Application |
| 3) <input checked="" type="checkbox"/> Information Disclosure Statement(s) (PTO/SB/08)
Paper No(s)/Mail Date <u>5/29/07</u> . | 6) <input type="checkbox"/> Other: _____ |

DETAILED ACTION

Response to Amendment

1. Receipt of applicant's amendment filed November 30, 2007 is acknowledged.

Information Disclosure Statement

2. The information disclosure statement (IDS) submitted on May 29, 2007 has been considered by the examiner.

Claim Rejections - 35 USC § 112

3. The following is a quotation of the first paragraph of 35 U.S.C. 112:

The specification shall contain a written description of the invention, and of the manner and process of making and using it, in such full, clear, concise, and exact terms as to enable any person skilled in the art to which it pertains, or with which it is most nearly connected, to make and use the same and shall set forth the best mode contemplated by the inventor of carrying out his invention.

4. **Claims 1-7** are rejected under 35 U.S.C. 112, first paragraph, as failing to comply with the written description requirement. The claim(s) contains subject matter which was not described in the specification in such a way as to reasonably convey to one skilled in the relevant art that the inventor(s), at the time the application was filed, had possession of the claimed invention.

In regard to claims 1-3, applicant has amended claim 1 and introduced new claims 2 and 3 that describe that the cooking rack, and first and second gas directing means "remain stationary" or include "stationary apertures" or "stationary discharge plates". However, review

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of the specification as originally filed does not appear to provide any discussion as to a requirement that these components "remain stationary" in order to function. Further, review of the entire disclosure as originally filed does not support the above noted claim limitations requiring certain elements remain stationary.

In regard to claim 7, the disclosure as originally filed does not appear to support the added limitations that the microwave energy is delivered to the oven cavity "without a mechanical microwave waveguide phase-altering device". Applicant's disclosure does provide some discussion as to the desirability of eliminating turntables generally associated with microwave ovens (see specification, pp. 13-14) but this discussion does not appear to correspond to the elimination of a "phase-altering" device.

Applicant must remove the new matter from the claims.

Claim Rejections - 35 USC § 103

5. The factual inquiries set forth in *Graham v. John Deere Co.*, 383 U.S. 1, 148 USPQ 459 (1966), that are applied for establishing a background for determining obviousness under 35 U.S.C. 103(a) are summarized as follows:

1. Determining the scope and contents of the prior art.
2. Ascertaining the differences between the prior art and the claims at issue.
3. Resolving the level of ordinary skill in the pertinent art.
4. Considering objective evidence present in the application indicating obviousness or nonobviousness.

6. **Claims 1-4** are rejected under 35 U.S.C. 103(a) as being unpatentable over **U.S. Patent No. 4,409,453 to Smith** ("Smith") in view of **U.S. Patent No. 4,480,164 to Dills** ("Dills") (cited in IDS filed May 19, 2006).

Smith discloses in the specification and figures I-XVIII (referred to below as figures 1-18) an invention in the same field of endeavor as applicant's invention and similar to that described in applicant's claims 1-4.

In particular, in regard to at least claim 1, Smith shows a speed cooking oven (1) for cooking a food product by hot gas comprising:

(a) an oven cavity (interior cavity of 1).

(b) a cooking surface formed by either the shelf (104) as shown in Figs. 2 and 7.

However, this shelf is possibly not regarded as a "cooking rack".

(c) a conduit means (at least plenum 35 and upper and lower chambers bounded by plates 82, 83) associated with the cooking chamber (79), said conduit means providing for the circulation of the gas to and from the cooking chamber (see Figs. 2 and 3);

(d) flow means (30) for causing circulation of the gas (see col. 6, lines 4-8);

(e) a thermal means (50) for heating the gas;

(f) a control means (24-28) for controlling the gas (see col. 5, lines 63-67);

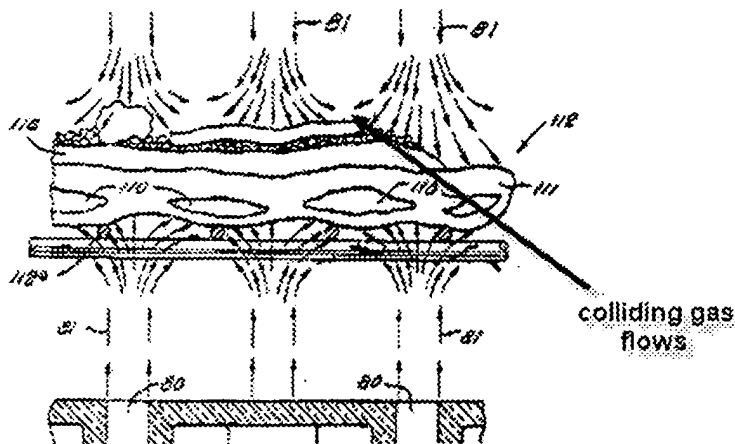
(g) a first gas directing means associated with the conduit means and disposed above the food product (see at least the central upper jet 81 in Fig. 6, which is produced from a tube 90 as shown in Fig. 2 or see the middle tube 126 producing jet 81b of Fig. 8);

(h) a second gas directing means disposed above the food product (see at least the rightmost jet 81 in Fig. 6, which is produced from a tube 90 as shown in Fig. 2 or see the right most tube 126 producing jet 81c in Fig. 8);

(i) the first and second gas directing means in Smith are stationary. However, Smith does disclose that the

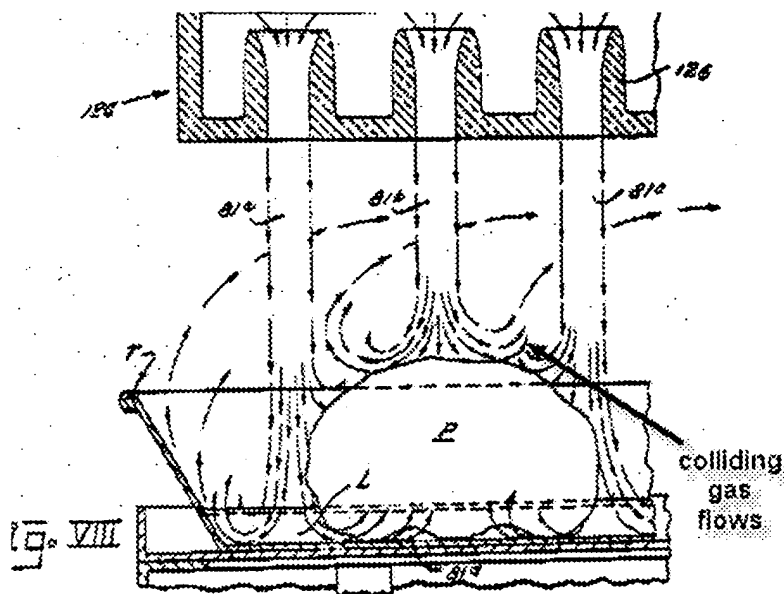
In regard to the recitations that the first and second gas directing means are configured to cause gas from these means to collide upon the upper surface of the food product, these recitations are considered present in Smith. Specifically, in describing Fig. 8, Smith notes that the high velocity jets (81) impinge upon the surface of a food product (P) "to provide very rapid heat transfer and very rapid water vapor removal from the surface of the product." (Smith, col. 10, lines 45-51). Further, Smith also describes that the jets (81) after striking a solid surface are "transformed into a turbulent mushroom shaped pressure area" (se col. 1, lines 6-10). The examiner considers that the above noted descriptions suggest that the gas jets from the gas directing means in either Fig. 6 (unshown tubes 90) or Fig. 8 (upper tubes 126) noted above collide with one another as described. The following are segments of Fig. 6 and Fig. 8 to further illustrate what the examiner considers to be the colliding flows.

Segment of Fig. 6 of Smith (the examiner has added the lead arrow and "colliding gas flows" text)



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Segment of Fig. 8 of Smith (the examiner has added the lead arrow and "colliding gas flows" text).



In regard to section (i), in Smith the first and second gas directing means either tubes/apertures (90 or 126) are understood to be stationary. However, Smith does not disclose that the cooking shelf (104) is moveable relative to the jet plate (124) (see col. 11, lines 11-14) either through the use of the moveable racks (108), through a rotating disc (see col. 11, lines 14-17) or through a conveyor (see col. 11, lines 41-45). It is the movement of the cooking surface that enables the jets to "sweep" over the food product which is intended to promote browning of the food (see abstract, col. 3, lines 46-55, col. 4, lines 9-16). **However, as the cooking surface moves, it is not regarded as being stationary.**

In regard to at least claim 2, the jet plates (85 or 124 or 385 in the second embodiment,) are formed by plates that include multiple stationary apertures that directed the heated air to the food products (see at least Fig. 7 and the second embodiment Figs. 8 and 15). The plurality of

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stationary apertures formed in the jet plates meet the limitations of first and second pluralities of stationary apertures.

In regard to at least claim 3, though the apertures noted above are located in Smith along the top of the oven cavity, as shown at least in Fig. 7, each side of the oven cavity (i.e. the space within the oven 1) includes hot air directed from the apertures. At least two of the apertures on the left side of Fig. 7 and at least two of the apertures on the right side of Fig. 7 are a plurality of apertures that are "adjacent" opposite sides of the oven cavity.

In regard to at least claim 4, as noted above, the apertures shown at least in Fig. 7, while along the top of oven wall are still properly regarded to be on opposite sides of the oven cavity as recited.

The examiner now turns to Dills to remedy the above noted deficiencies in Smith as to the lack of a stationary cooking rack. this reference shows a combined microwave and hot air oven that functions as a browning system for food (see title and abstract). In Dills the browning oven includes a stationary cooking rack (38). Therefore, the evidence suggests that in a combination microwave and hot air oven, as in each of Smith and Dills, "browning" of a food product may occur either through the use of a moveable food support (Smith) or a stationary cooking rack (Dills).

Accordingly, it would have been obvious to a person of ordinary skill in the art at the time the invention was made to modify the cooking surface of Smith to incorporate a stationary cooking rack as taught in Dills as the simple substitution of the these two cooking surfaces to obtain the predictable result of forming a food support surface that enables food "browning" suggests a conclusion of the obviousness based on the evidence of record.

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7. **Claims 5-7** are rejected under 35 U.S.C. 103(a) as being unpatentable over Smith in view of Dills as applied to claim 4 above, and further in view of **U.S. Patent No. 5,166,487 to Hurley** ("Hurley") (cited in IDS filed May 19, 2006).

Smith and Dills disclose substantially all the limitations of claim 5-7 (note discussion above) with the exception of microwave waveguides that launch microwave energy from opposite sides of the oven cavity. In Smith, while it is anticipated that a microwave energy generator will be used in conjunction with the heated jets (see at least col. 7, lines 3-21), Smith appears to only suggest the use of a single microwave energy generator.

Hurley teaches a combination microwave and hot air oven in the same field of endeavor as applicant's invention and Smith. In Hurley, the microwave heating is enabled by multiple microwave generating magnetrons (12 and 14) that are desirably arranged "at opposite ends of the cooking chamber" (see col. 5, lines 54-55) to direct microwave energy (15) to a food product.

In regard to claims 6 and 7, neither Smith nor Hurley nor Dills suggest that the hot gas and microwave energy are mixed until they enter the oven cavity. Further, these references also do appear to suggest a "mechanical microwave waveguide phase-altering device". Therefore, neither claims 6 nor 7 distinguish applicant's invention over the prior art of record.

Therefore, in regard to claims 5-7, it would have been obvious to a person of ordinary skill in the art at the time the invention was made to modify the cooking oven of Smith to incorporate microwave energy devices at opposite sides of a cooking chamber as taught in Hurley as these locations are recognized in the art as desirable for directing microwave energy to a food product (see Hurley, col. 5, lines 47-55).

Double Patenting

8. The nonstatutory double patenting rejection is based on a judicially created doctrine grounded in public policy (a policy reflected in the statute) so as to prevent the unjustified or improper timewise extension of the “right to exclude” granted by a patent and to prevent possible harassment by multiple assignees. A nonstatutory obviousness-type double patenting rejection is appropriate where the conflicting claims are not identical, but at least one examined application claim is not patentably distinct from the reference claim(s) because the examined application claim is either anticipated by, or would have been obvious over, the reference claim(s). See, e.g., *In re Berg*, 140 F.3d 1428, 46 USPQ2d 1226 (Fed. Cir. 1998); *In re Goodman*, 11 F.3d 1046, 29 USPQ2d 2010 (Fed. Cir. 1993); *In re Longi*, 759 F.2d 887, 225 USPQ 645 (Fed. Cir. 1985); *In re Van Ornum*, 686 F.2d 937, 214 USPQ 761 (CCPA 1982); *In re Vogel*, 422 F.2d 438, 164 USPQ 619 (CCPA 1970); and *In re Thorington*, 418 F.2d 528, 163 USPQ 644 (CCPA 1969).

A timely filed terminal disclaimer in compliance with 37 CFR 1.321(c) or 1.321(d) may be used to overcome an actual or provisional rejection based on a nonstatutory double patenting ground provided the conflicting application or patent either is shown to be commonly owned with this application, or claims an invention made as a result of activities undertaken within the scope of a joint research agreement.

Effective January 1, 1994, a registered attorney or agent of record may sign a terminal disclaimer. A terminal disclaimer signed by the assignee must fully comply with 37 CFR 3.73(b).

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9. **Claim 1** is rejected on the ground of nonstatutory obviousness-type double patenting as being unpatentable over claims 1 and 3 of U.S. Patent No. **U.S. Patent No. 6,874,495** in view of U.S. Patent No. 4,480,164 to Dills ("Dills") (cited in IDS filed May 19, 2006).

Although the conflicting claims are not identical, they are not patentably distinct from each other because claim 1 of this application is broader in scope but claiming the same invention as claims 1 and 3 of U.S. Patent No. 6,874,495 with the exception that claim 1 of this application now recites;

- "oven cavity" instead of a "housing defining a cooking chamber"
- a cooking rack in the oven cavity for supporting a food product
- the cooking rack, first gas directing means and second gas directing means are configured to remain stationary during cooking

However, turning to Dills, this reference shows a combined microwave and hot air oven in the same field of endeavor as claims 1 and 3 of U.S. Patent No. 6,874,495 and applicant's invention. In Dills, the oven includes an oven cavity (24) that receives a stationary cooking rack (38). Further, the hot air is delivered by a gas directing means (28) that is stationary during cooking.

Therefore, it would have been obvious to a person of ordinary skill in the art that the "housing defining a cooking chamber" of claims 1 and 3 of 6,874,495 would be regarded as an oven cavity. Further, the person of ordinary skill in the art would appreciate that a cooking oven is understood to include a stationary cooking rack to support food as taught in Dills. Lastly, the person of ordinary skill in the art would appreciate that the recited gas directing means of claims

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1 and 3 of U.S. Patent No. 6,874,495 would be formed as stationary plates to direct the gas into the cavity.

10. **Claim 1** is rejected on the ground of nonstatutory obviousness-type double patenting as being unpatentable over claims 1-3 of U.S. Patent No. **U.S. Patent No. 7,055,518** in view of U.S. Patent No. 4,480,164 to Dills ("Dills") (cited in IDS filed May 19, 2006).

Although the conflicting claims are not identical, they are not patentably distinct from each other because claim 1 of this application is broader in scope but claiming the same invention as claims 1-3 of U.S. Patent No. 7,055,518 with the exception that claim 1 of this application now recites;

- "oven cavity" instead of a "housing defining a cooking chamber"
- a cooking rack in the oven cavity for supporting a food product
- the cooking rack, first gas directing means and second gas directing means are configured to remain stationary during cooking

However, turning to Dills, this reference shows a combined microwave and hot air oven in the same field of endeavor as claims 1 and 3 of U.S. Patent No. 7,055,518 and applicant's invention. In Dills, the oven includes an oven cavity (24) that receives a stationary cooking rack (38). Further, the hot air is delivered by a gas directing means (28) that is stationary during cooking.

Therefore, it would have been obvious to a person of ordinary skill in the art that the "housing defining a cooking chamber" of claims 1-3 of 7,055,518 would be regarded as an oven cavity. Further, the person of ordinary skill in the art would appreciate that a cooking oven is

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understood to include a stationary cooking rack to support food as taught in Dills. Lastly, the person of ordinary skill in the art would appreciate that the recited gas directing means of claims 1-3 of U.S. Patent No. 7,055,518 would be formed as stationary plates to direct the gas into the cavity.

11. **Claims 1, 4, and 5** are rejected on the ground of nonstatutory obviousness-type double patenting as being unpatentable over claims 1, 10, and 11 of copending **Application No.**

11/098,280 in view of U.S. Patent No. 4,480,164 to Dills ("Dills") (cited in IDS filed May 19, 2006).

Although the conflicting claims are not identical, they are not patentably distinct from each other because claim 1 of this application is broader in scope but claiming the same invention as claims 1-3 of U.S. Patent No. 11/098,280 with the exception that claim 1 of this application now recites;

- "oven cavity" instead of a "housing defining a cooking chamber"
- a cooking rack in the oven cavity for supporting a food product
- the cooking rack, first gas directing means and second gas directing means are configured to remain stationary during cooking

However, turning to Dills, this reference shows a combined microwave and hot air oven in the same field of endeavor as claims 1, 4, and 5 of Application No. 11/098,280 and applicant's invention. In Dills, the oven includes an oven cavity (24) that receives a stationary cooking rack (38). Further, the hot air is delivered by a gas directing means (28) that is stationary during cooking.

Therefore, it would have been obvious to a person of ordinary skill in the art that the "housing defining a cooking chamber" of claims 1, 10, and 11 of Application No. 11/098,280 would be regarded as an oven cavity. Further, the person of ordinary skill in the art would appreciate that a cooking oven is understood to include a stationary cooking rack to support food as taught in Dills. Lastly, the person of ordinary skill in the art would appreciate that the recited gas directing means of claims 1, 10, and 11 of Application No. 11/098,280 would be formed as stationary plates to direct the gas into the cavity.

This is a provisional obviousness-type double patenting rejection because the conflicting claims have not in fact been patented.

Response to Arguments

12. Applicant's arguments filed November 30, 2007 have been fully considered but they are not persuasive.

Applicant argues that Smith away from having hot air flows in a cooking oven from "colliding" with one another to cause cooking of a food product. The examiner respectfully disagrees.

In response, the examiner notes that applicant has pointed to teachings in Smith as to the spacing between the rows of multiple jets (81) which form passages for diffused air that has spent its heat energy and is evacuated from the oven cavity to return air duct (36) (i.e. col. 8 beginning line 56). However, Smith clearly discloses that the purpose of the jets (81) is to "provide rapid heat transfer" to the food product (see col. 9, lines 19-20) and that the jets (81) are spaced to from high pressure and low pressure heating zones wherein impinging air flows to

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flow over the surface of the food product to an adjacent low pressure area (see col. 8, lines 63-65). In describing Fig. 8, Smith also notes that heat air flows over the food product from areas of high pressure to areas of low pressure to transfer heat to the product (see col. 9, line 65 through col. 10, line 2). Further, Smith also describes that the streamlined jets (81) are transformed into "turbulent mushroom shaped pressure" areas which "effectively heat[s] the underlying surface" of food products (see col. 11, lines 6-10). These turbulent pressure areas are understood to include the air from the jets, which is no longer in streamlined form, but still includes flows of air within this area in order to transfer the heat from the air flows to the food product. These turbulent pressure areas are reasonably understood to include air from adjacent jets flows such that the "turbulent" nature of these zones causes air from these adjacent jets to collide and effectively transfer heat to the food product.

Applicant appears to argue on page 8 of the response that the transformation of the jets into the "turbulent mushroom shaped pressure area" indicates that there is no airflow within the pressure areas. The examiner respectfully disagrees.

In response, the examiner considers that the very purpose of these turbulent zones is to promote rapid movement of airflow within the zones against the surface of the food product to promote rapid cooking. That the streamlined jets are described as being "transformed" into the turbulent pressure area is understandable as the streamlined nature of the jets is not what promotes the rapid cooking but the turbulent nature of heated air within the pressure area as this area contacts the food product. Applicant's appears to suggest that the turbulent zones are somehow devoid of airflow. However, the logical understanding of these turbulent areas is that they cause rapid, non streamlined, interaction of the heated air with the food product to promote

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rapid cooking. As these zones lie in between adjacent jet columns the zones are reasonably considered to combine these adjacent jet flows in the turbulent areas causing the air from the adjacent jets to collide as recited.

Applicant also argues that Smith seeks to avoid turbulent interaction of air flows (see response, p. 10). The examiner respectfully disagrees.

In response, the examiner notes that the teachings of Smith identified by applicant as to returning air not interfering with jets 81 (col. 8, lines 60-65) is understood to mean that the streamlined nature of the jets is not interfered with. However, the turbulent pressure areas in between the jets are reasonably understood to include air from each of the adjacent jets that collide with one another to produce the turbulent area and the improved heating that flows from the turbulent nature of the air in the pressure area (see col. 11, lines 6-10).

Applicant also disputes that the "turbulent pressure area" described by Smith in relation to the cooking of the bottom of the food product would also be present on the top of the food product. The examiner respectfully disagrees.

In response, the examiner considers that as the jets of air impinging the bottom of the food product are substantially identical to the flows of air impinging the top of the food product (see at least fig. 6) a person of ordinary skill in the art would reasonably appreciate that a similar "turbulent pressure area" would result on top Of the food product.

Applicant has asserted that the double patenting rejections of the prior Office action have been overcome. For the reasons noted above, the examiner disagrees.

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Accordingly, while applicant's arguments have been carefully considered, they are not persuasive. Applicant's claims are not considered to patentably distinguish applicant's invention over the prior art of record.

Conclusion

13. Applicant's amendment necessitated the new ground(s) of rejection presented in this Office action. Accordingly, **THIS ACTION IS MADE FINAL**. See MPEP § 706.07(a). Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire **THREE MONTHS** from the mailing date of this action. In the event a first reply is filed within **TWO MONTHS** of the mailing date of this final action and the advisory action is not mailed until after the end of the **THREE-MONTH** shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than **SIX MONTHS** from the date of this final action.

14. Any inquiry concerning this communication or earlier communications from the examiner should be directed to Josiah Cocks whose telephone number is (571) 272-4874. The examiner can normally be reached on M-F 8:00-5:30.

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If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Steven McAllister, can be reached (571) 272-6785. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

jcc
February 1, 2008


JOSIAH COCKS
PRIMARY EXAMINER
ART UNIT 3749